sentence, were never mentioned in the said affidavit. Be that as it may, I proceeded to hear this application based on the available facts in the said affidavit, which facts are as follows. The applicant was convicted and sentenced on 30 June 1988. On 8 July 1988, his solicitors filed the notice of appeal. On 23 August 1988 and 6 December 1988, the solicitors applied to the magistrate's court, Balik Pulau for the notes of evidence. On 19 December 1988, the court sent to the solicitors the said notes of evidence and grounds of decision. Here, it is conceded by the deponent that on 19 December 1988 the magistrate's court, Balik Pulau, sent his office the notes of evidence and grounds of decision. However, as he had laboured under the impression that the document had not been sent to him, on 7 January 1989 he despatched a reminder to the magistrate's court, Balik Pulau. He had also instructed one of his staff to go to the Balik Pulau court to collect the notes of evidence and the grounds. There, it was found out that the notes of evidence and grounds of decision were sent on 19 December 1988. Upon a search made in his office it was discovered that the document had been placed in a different file and by which time the period of ten days to file the petition of appeal under s 307(iv) had expired. Paragraphs (iii) and (iv) of s 307 state:

> (iii) When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.
>
> (iv) Within ten days after the copy of the grounds of decision has been served as in the last preceding subsection provided, the appellant shall lodge with the clerk of the Magistrate's court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

In short, the deponent claimed that the delay was due to sheer inadvertence. Hence, by the time this motion was filed on 18 February 1989, the applicant was about 46 days out of time.

In my opinion, the underlying principle of s 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case. In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal. Needless to say, I would have been persuaded to grant the application if there was before me materials such as a proposed petition of appeal to enable me to consider the grounds.

For the above reasons, I am quite satisfied that the stated grounds in the affidavit are not such as to persuade me to exercise my discretion in favour of granting the application. Accordingly I dismiss this application.

*Application dismissed.*

Solicitors: *BC Teh & Cheah.*

Reported by *Ng Sheau Jiuan*

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## Malaysia Credit Finance Bhd v Yap Hock Choon & Anor

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-13-86
PEH SWEE CHIN J
28 FEBRUARY 1989

*Land Law – Application for an order of possession by chargees – Service of Form 16K on chargors – Pending appeal in Supreme Court against sale by private treaty – Pending appeal not relevant to present application – Chargors in occupation of land – Whether remedy of possession could be had against chargors in occupation – National Land Code 1965, ss 270, 271 & 272*

This was an application for an order of possession by the plaintiff against the defendants in respect of a piece of land together with a building thereon ('the said land'), under s 271(1)(b) of the National Land Code ('the Code'). The plaintiff ('the chargee') was the chargee of the said land over which the defendants ('the chargors') had created a charge. Before the present application, there was a previous similar application by the chargee for an order of possession. One of the chargors filed a counter application for a stay of all further proceedings or execution. They were dealt with together by the court. The court had held in the earlier application of both parties that since Form 16K had not been served, the application by the chargee for the order of possession should be dismissed and that the counter application for stay of proceedings should also be dismissed. Before the present application, the chargee had taken steps to serve both the chargors with the Form 16K. The court was informed that a memorandum of transfer of the said land sold to a purchaser by private treaty had not been signed, pending the result of the present application. The present application was not countered by an application from the chargors for stay of proceedings or execution this time. The chargors put forward the following arguments:

(a) There is a pending appeal in the Supreme Court in respect of an order of sale by private treaty.
(b) That an earlier similar application for the order of possession had been dismissed by the court and that this present application was wrong, as there should have been an appeal also against the dismissal of the previous application of the chargee.

(c) That the chargee had no right to apply for the order of possession because the land had been sold to the purchaser.
(d) That no remedy of possession could be had by a chargee against the chargors in occupation of the said land by virtue of s 270 of the Code.

**Held,** allowing the application:

(1) The pending appeal in the Supreme Court in the circumstances was not relevant to the present application for the order of possession from the chargee and was therefore without avail to the chargors, for the remedy of claiming possession by the chargee and the right to apply for an order of sale by public auction are not mutually exclusive.

(2) As the previous application was dismissed solely on the ground of the non-compliance of the prerequisite of service of the Form 16K, under s 272(3) of the Code, and since the Form 16K had, after the said dismissal, been so served, the technical point had been complied with, that would enable the chargee to file the present application.

(3) The chargee had remained as chargee on the title, and whatever arrangement it had made with the purchaser was not important so long as the purchaser had not come forward to the court to challenge the chargee in any way in the present application. If the court were to accept the argument of the chargors' counsel, it would have equally meant that the chargors would have had no leg to stand on in the present application as all rights, including any right as chargors or registered owners, would have passed completely to the purchaser.

(4) Section 271 and s 272 of the Code clearly and unmistakeably give a right to the chargee to oust the chargors from their possession of the charged land. Section 270(1)(b) of the Code, however, would be totally repugnant to such right, and would make nonsense of ss 271 and 272. Only by disregarding the word 'not' in s 270(1)(b) would make it consonant with ss 271 and 272. The court therefore held that the word 'not' as described above ought to be disregarded when reading s 270(1)(b) so that the said land presently in occupation of the chargors would be thus amenable to a claim for possession under s 271(1)(b) of the Code.

(5) The court made an order in terms of the application by the chargee for an order of possession and further directions in connection therewith.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-113 of 1989.]

**Cases referred to**

1 *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1971] AC 850 (folld)
2 *Metropolitan Board of Works* v *Steed* (1881) 8 QBD 445 (refd)

**Legislation referred to**

National Land Code 1965 ss 270(1), (2), (3), 271(1)(b), (2), (3), 272(1), (2)

*Poh Chee Seng* for the plaintiff.
*R Jegatheesa* for the defendants.

*Cur Adv Vult*

**Peh Swee Chin J:** This was an application for an order of possession by the plaintiff against the defendants in respect of a piece of land together with a building thereon known as No 46, Lorong Dr Tun Ismail Ipoh (hereafter called 'the said land'), under s 271(1)(b) of the National Land Code, (hereafter called 'the Code'). The plaintiff (hereafter called 'the chargee') was the chargee of the said land over which the defendants (hereafter called 'the chargors') had created a charge. Before dealing with the present application, it would be necessary to relate a brief history of some previous litigation between the parties leading up to the present application.

Before the present application, there was a previous similar application by the chargee for an order of possession. The chargors, or rather one of the chargors, filed a counter application for a stay of all further proceedings or execution. They were dealt with together by the court. The grounds of the said counter application were (1) that an appeal filed by the chargors was pending in the Supreme Court, inter alia, against an order of sale by private treaty made by another learned judge of this court on the ground that it should have been an order for sale by public auction instead; (2) that the application for the order of possession was premature and should be dismissed because Form 16K provided under s 272(3) of the Code had not yet been served on the chargors; and (3) that, in counsel's oral submission, under s 270 of the Code, no order for possession could be made against chargors.

I had held in the earlier applications of both parties that since Form 16K had not been served, the application by the chargee for the order of possession should be dismissed and that the counter application for stay of proceedings should also be dismissed. No appeal has been filed against the dismissal of both the earlier applications and I would emphasize that I had confined myself solely to the ground of failure to serve the Form 16K for dismissing the chargee's application for the order of possession without finding it necessary at all to deal in any way with other grounds raised by learned counsel for the benefit of the chargors.

Before the present application, but close on the heels of its earlier application, the chargee had taken steps to serve both the chargors with the Form 16K in question, the chargors being husband and wife, and with the said husband having been adjudicated bankrupt. The official assignee had, for the present application, agreed or decided to allow the said husband to contest the present application; and was represented by a bankruptcy officer from the assistant official assignee's office of Perak. This court had of course allowed the said official assignee to appear and be heard against the chargee's present application, in which the said bankruptcy officer appeared to have let learned counsel for the wife/chargee bear the brunt of making submission.

The said bankruptcy officer, on being asked by the court, informed the court that a memorandum of transfer

of the said land sold to a purchaser had not been signed by the official assignee, pending the result of the present application. The implication was obvious, ie that the chargee and chargors had remained as such on the title of the said land. The memorandum of transfer, it will be remembered, was signed by the purchaser as a result of an order of sale by private treaty given by the court earlier. The purchaser did not seek to intervene, presumably waiting for the chargee to do the needful for the purchaser.

The present application was not countered by an application from the chargors for stay of proceedings or execution this time. The wife/chargor again referred to the pending appeal in the Supreme Court in respect of an order of sale by private treaty referred to above. I did not think that the pending appeal in the Supreme Court in the circumstances was relevant to the present application for the order of possession from the chargee and was therefore without avail to the chargors, for the remedy of claiming possession by the chargee and the right to apply for an order of sale by public auction, be it noted, are not mutually exclusive.

Next, it was argued by the chargors that an earlier similar application for the order of possession had been dismissed by me and that this present application was wrong, as there should have been an appeal also against the dismissal of the previous application of the chargee. As the previous application was dismissed solely on the ground of the non-compliance of the prerequisite of service of the Form 16K, under s 272(3) of the Code, and since the Form 16K had, after the said dismissal, been so served, the technical point had been complied with, that would enable the chargee to file the present application.

It is pertinent that I should mention that the husband/chargor had been in occupation of the said land at all material times. The present application contained a prayer for a further direction to break open the door of the house on the said land as it seemed that the husband/chargor had defiantly refused to open the door of the house.

It was also argued for the chargors that the chargee had no right to apply for the order of possession because the land had been sold to the purchaser. The chargee had remained as chargee on the title, and whatever arrangement it had made with the purchaser was not important so long as the purchaser had not come forward to the court to challenge the chargee in any way in the present application. If I were to accept learned counsel's argument, it would have equally meant that the chargors would have had no leg to stand on in the present application as all rights, including any right as chargors or registered owners, would have passed completely to the purchaser.

It was finally argued, and this time with some justification, that no remedy of possession could be had by a chargee against the chargors in occupation of the said land by virtue of s 270 of the Code. I will set out all the relevant sections of the Code including s 270 to see if the argument could be sustained.

Section 270 and et seq are set out in Chapter 4 of the Code under a heading and a sub-heading reproduced as follows:

> Chapter 4 – Remedies of Chargees: Possession
>
> *Limited application of powers under this chapter*
>
> 270(1) The powers conferred by this Chapter –
>
> (a) shall not be exercisable in relation to any land held under Land Office title or the corresponding form of qualified title;
>
> (aa) shall not be exercisable in the case of any charge of an undivided share in alienated land; and
>
> (b) shall, in the case of any town or village land not falling within paragraph (a), be exercisable only in so far as the land is not occupied by the chargor.
>
> 270(2) Subject to subsection (3), the said powers shall be exercisable by first chargees only.
>
> 270(3) The Minister may, by order made on the recommendation of the National Land Council, provide in any State for the exercise of the said powers by second and subsequent chargees; and any such order may modify the provisions of this Chapter to such extent, and in such manner, as may appear to the Minister and the Council necessary or desirable for the purpose.
>
> *Right to possession*
>
> 271(1) Subject to section 270, any chargee may, at any time when the chargor is in breach of any agreement on his part expressed or implied in the charge, enter into possession of the whole or any part of the charged land or, as the case may be, the land comprised in the charged lease –
>
> (a) so far as it is subject to any lease or tenancy binding on him, by receiving the rent payable to the chargor thereunder; and
>
> (b) so far as it is not so subject, by going into occupation thereof.
>
> 271(2) The exercise of his powers under this section by a chargee of any lease shall not constitute a breach of any provision thereof, express or implied, restricting the right of the lessee to part with the possession of the demised property.
>
> 272(1) A chargee intending to enter into possession of any land pursuant to section 271 shall –
>
> (a) where he is to do so by receiving the rent payable to the chargor under any lease or tenancy, serve a notice in Form 16J on the lesssee or tenant, and a copy thereof on the chargor; and
>
> (b) where he is to do so by going into occupation, serve a notice in Form 16K on the chargor.
>
> 272(2) Upon the service of a notice in Form 16J on any lessee or tenant, there shall pass to the chargee all the rights, powers and remedies of the chargor, with respect to the receipt and recovery of, and the giving of discharges for, the

rent in question (including any amount due, but not paid, prior to the service of the notice).

272(3) Where any chargor on whom a notice in Form 16K is served fails within the period specified in that behalf in the notice to admit, or secure the admission of, the chargee into occupation of the land in question, the chargee may apply to the Court for an order for possession in accordance with the provisions of any law for the time being in force relating to civil procedure.

It will be seen that ss 271 and 272 so clearly and unmistakeably give a right to the chargee to oust the chargors from their possession of the charged land, such that any further comment from me would be superfluous in view of such express words contained in them. Section 270(1)(b) of the Code, however, would be totally repugnant to such right, and would make nonsense of ss 271 and 272. Only by disregarding the word 'not' in s 270(1)(b) would make it consonant with ss 271 and 272 as in the manner shown below:

... the powers of recovering possession by a chargee ... should be exercised only in so far as the land is 'not' occupied by the chargor.

The crossing out of the word 'not' above would denote my disregard of it. I give now my reasons for disregarding it.

In the first place, while that august body of Parliament (for which the court has the greatest respect) made laws, the laws would have been undoubtedly and in fact drafted by legal officers. Sometimes, drafting of such legislation would be delegated to comparatively junior legal officers. This well-known fact coupled with potential human errors of such draftsmen and printers also could give rise to defective language, misprints and misnomers in any act of Parliament.

Secondly, we had such a repugnancy posed by ss 271 and 272, on one hand and s 270(1)(b) on the other. Applying the purposive method of construction of statutes as explained by Lord Diplock in *Kammins* v *Zenith Investments*[1] at pp 880 and 882, the court asked itself the question as to what was the subject matter of the said Chapter 4 of the Code? What objects if any, in relation to that subject matter, did Parliament intend to achieve? Undoubtedly Parliament intended to give a right to a chargee to, inter alia, claim possession by going into actual occupation of the charged land or alternatively to obtain possession symbolically in the case of an existing tenant of a chargor being in occupation, so as to assign all the rights of the chargor in regard to the tenancy to the chargee thereby enabling the chargee to receive the rent etc.

Another object would appear to be to prevent chargors of land office titles from being evicted from their homes. The said land herein was held at all material times under a registry title.

The courts in the past have never refrained from holding, in regard to express words in a statute, that 'or' should mean 'and'; 'shall' should mean 'may' and vice versa. A case in point is *Metropolitan Board of Works* v *Steed*,[2] in which the word 'or' was read by the court as 'and'. I therefore held that the word 'not' as described above ought to be disregarded when reading s 270(1)(b) so that the said land presently in occupation of the chargors would be thus amenable to a claim for possession under s 271(1)(b) of the Code.

Consequently I made an order in terms of the application by the chargee for an order of possession and further directions in connection therewith. The court further certified that it required no further arguments in open court on application by the husband/chargor for such further arguments. The court further granted leave to appeal to the Supreme Court on such an application from the same chargor who also asked for stay of execution. The court granted such stay of execution also after hearing all the parties hereto. The stay granted was for a period of one month from the date of judgment unless a notice of appeal was filed against my judgment in which case the stay would be extended until the conclusion of the hearing of the appeal.

*Order accordingly.*

Solicitors: *Chong, Poh & Lim*; *RJ Esa & Co.*

Reported by *Wong Kim Fatt*

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## Hiap Yiak Trading Sdn Bhd & Ors v Gim Hin & Co (M) Sdn Bhd

HIGH COURT (MUAR) – ORIGINATING MOTION NO 38-18-1988
EUSOFF CHIN J
24 FEBRUARY 1989

*Civil Procedure – Whether affidavits which are not affirmed and filed after a summons is issued may be used in support of the application – UK Rules of the Supreme Court, O 28 r 1A – Rules of the High Court 1980*

*Land Law – Entry of caveat on land – Need to prove a claim to a title or registrable interest in the land or a right to such title or registrable interest – Ineffectiveness of prohibitive order registered against land – Where the registered owner has no beneficial interest in the land – National Land Code 1965, s 323*

By an agreement of sale of land, the registered proprietor of land agreed to sell the land to the first four applicants. The agreement contained an option for the registered proprietor to repurchase the land by a certain time. This option was not exercised and, after negotiations, the parties agreed to extend the option. After further discussions, a supplementary agreement was entered into pursuant to which the option was subse-